KERAJAAN MALAYSIA

v.

SOUTH EAST ASIA INSURANCE BHD

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CIVIL SUIT NO: S2-21-126-1997]
29 SEPTEMBER 1999

CIVIL PROCEDURE: *Want of prosecution - Delay in prosecuting action - Plaintiff failed to take any steps after defence filed - Notice to show cause why suit should not be struck out given to parties - Notice stated date fixed for show cause will be vacated if either party informs court of intention to proceed - Whether notice bars parties from taking further steps unless delay explained - Whether filing of reply to defence after notice justifies vacation of date fixed for show cause - Whether defendant ought to have applied to strike out suit upon pleadings being deemed close - Whether defendant equally guilty of delay - Whether defendant ought to strike out reply for being filed out of time instead of appealing against decision to vacate date fixed for show cause*

The plaintiff commenced a suit against the defendant on 1 October 1997. The defendant duly entered appearance on 22 October 1997 and filed a defence on 10 November 1997. However, since then no further action was taken by either party to the proceedings. The court then wrote a letter dated 3 May 1999 to both parties to the proceedings that they must on 19 May 1999 appear before the court to show cause as to why the suit ought not to be struck out for want of prosecution. However, para 2 of the letter stated that should either party wish to proceed with the suit, they ought to act immediately and inform the court of their action so that the court could remove the case from the show cause list. On 12 May 1999 the plaintiff duly informed the court that they had filed a reply to the defence. The court therefore, on 14 May 1999, vacated the date fixed for the show cause. The defendant appealed against the decision of the court vacating the show cause date on the ground, *inter alia*, that the show cause notice was a bar to parties from taking further steps until cause was shown to the satisfaction of the court.

Held:

[1] The defendant was aware that the pleadings were deemed to have been closed as at 24 November 1997 but yet it did not apply to strike out the suit. It is plain that the court *vide* para 2 of the show cause notice directed the parties that should they wish to proceed with the suit, they ought to act immediately and inform the court of their action so that the case could

be taken off the show cause list. If the notice to show cause did not include the said para 2, the court will have to listen to the explanation for the delay. However, because the defendant itself failed to act, the court did not wish to consider the issue of delay and thus included para 2. The inordinate delay was by both parties and the delay by the defendant negates the delay of the plaintiff.

[2] Clearly the cases relating to want of prosecution cannot apply to this case because of the inclusion of para 2 in the show cause notice. Moreover, the court in this instance moved on its own motion. The justice of the case warrants that the court acts on its own notice which provided for the withdrawal of this case from the show cause list if either party acted on the said notice.

[3] The proper action that the defendant ought to have taken was not to file this appeal but to apply to strike out the reply to the defence as having been filed out of time. However, the defendant should also appreciate that the court can, at its discretion, extend time.

[Appeal dismissed.]

Case(s) referred to:

Fitzpatrick v. Batger & Co Ltd [1967] 2 All ER 657 ***(refd)***

Hong Kong Bank (M) Bhd v. Raja Letchumi Ramarajoo & Ors [1996] 4 CLJ 155 ***(not foll)***

Public Finance Bhd v. Natcom Development Sdn Bhd & Ors [1996] 2 MLJ 657 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 rr. 3(4), 20(1)(a), (b), O. 20 r. 1(a), O. 25 rr. 1(1), 4, 5, O. 34 r. 8

For the appellant - M Pathmanathan; M/s Yusuf Khan & Pathmanathan

For the respondent - Shanaz Sulaiman, Legal Advisory Department Works Ministry

Reported by Izzaty Izzuddin

JUDGMENT

RK Nathan J:

Facts

The plaintiff sued the defendant insurer on a guarantee agreement for a sum of RM369,444.42 and for interest and costs. This suit was filed on 1 October 1997. The defendant entered appearance on 22 October 1997 and filed a defence on 10 November 1997. Nothing happened after that. Neither party took any action on this matter. The court then on its own motion took the initiative

to write to both parties, a letter dated 3 May 1999 to show cause why this suit ought not to be struck out for want of prosecution. Parties were required to appear before me in open court on 19 May 1999 at 9.30am. This notice was issued by my Deputy Registrar (DR) pursuant to my directions. The said notice addressed to both solicitors is reproduced herewith:

Ruj. Kami: (6)dlm.S2-21-126-97

Tarikh: 3.5.99

1. Peguam Persekutuan
   Bahagian Penasihat Undang-Undang
   Kementerian Kerja Raya
   (Ruj. Tuan: Idham/AY/KKR-U-31.423(26/9/97)

2. T/n Yusuf Khan & Pathmanathan
   (Ruj. Tuan: S276/50)

Tuan,

NO. KES: S2-21-126-97

PIHAK: Kerajaan Malaysia v. South East Asia Insurance Berhad

NOTIS: Tiada tindakan selepas pembelaan difailkan pada 10.11.97
TUNJUK
SEBAB

NOTIS adalah dengan ini diberikan kepada tuan bahawa kes yang tersebut di atas ditetapkan pada hari Rabu, 19.5.99 jam 9.30 pagi di Mahkamah Terbuka di hadapan Y.A. Hakim Dato' Dr. Kamalanathan Ratnam di Tingkat 11, Wisma Denmark, untuk menunjukkan sebab kenapa kes ini tidak patut ditolak kerana kegagalan tuan untuk meneruskan dengan pendakwaan kes ini. **Peguam yang mengendalikan kes ini diwajibkan hadir.**

2. Jika tuan ingin meneruskan dengan pendakwaan kes ini, sila ambil tindakan susulan dengan serta-merta dan memberitahu Mahkamah melalui surat akan tindakan yang telah diambil agar kes ini dapat dikeluarkan daripada senarai kes tunjuk sebab.

3. Jika tuan ingin menarik balik tindakan ini atau tidak meneruskan tindakan ini, sila failkan Notis Pemberhentian. Pastikan bahawa notis tersebut juga ditandatangani oleh pihak yang lain.

4. Kedua-kedua tindakan di perenggan 2 dan 3 hendaklah diambil sekurang-kurangnya 1 minggu sebelum tarikh tunjuk sebab.

Sekian, terima kasih.

"BERKHIDMAT UNTUK NEGARA"

Saya yang menurut perintah,

t.t.

(TAN GHEE PHAIK)
Timbalan Pendaftar
Bahagian Sivil 2
Mahkamah Tinggi
Kuala Lumpur.

Upon receipt of the said notice the Peguam Persekutuan (PP) wrote to the DR a letter dated 12 May 1999. The same is reproduced herewith for its relevance.

SEGERA/DENGAN TANGAN

Ruj. Tuan:(6)dlm S2-21-126-97
Bil Kami: (14)dlm.KKR/U/31/423
Tarikh: 12 Mei 1999

Timbalan Pendaftar
Bahagian Sivil 2
Mahkamah Tinggi Kuala Lumpur
Wisma Denmark
Jalan Ampang
50450 Kuala Lumpur

Puan,

Mahkamah Tinggi Kuala Lumpur
Guaman No: S2-21-126-97
Kerajaan Malaysia v. South East Asia Insurance Berhad

Dengan hormatnya, saya merujuk perkara di atas dan surat pihak puan bertarikh 3 Mei 1999.

2. Untuk makluman pihak puan, kes tersebut telah ditetapkan untuk tunjuk sebab pada hari Rabu 19 Mei 1999 di hadapan Y.A. Hakim Dato' Dr. Kamalanathan Ratnam.

3. Untuk makluman pihak puan, juga, pihak kami telah pun memfailkan Jawapan Kepada Penyataan Pembelaan hari ini.

4. Sehubungan itu, saya dengan rendah diri memohon agar kes ini dapat dikeluarkan daripada senarai kes tunjuk sebab.

5. Kerjasama dan budi baik pihak puan amat saya hargai.

Sekian, terima kasih.

* BERKHIDMAT UNTUK NEGARA *

Saya yang menurut perintah,

t.t.

(SHAHNAZ BT. SULAIMAN)
Peguam Persekutuan
Kementerian Kerja Raya Malaysia
KUALA LUMPUR

s.k. T/n Yusuf Khan & Pathmanathan
Suite 1B, 1st Floor
The Tower
Plaza Pekeliling
Jalan Tun Razak
50400 Kuala Lumpur.

On receipt of the said letter from the PP, the DR then minuted on the same letter itself her comment, which it is again relevant to reproduce. It reads as follows:

Peguam berkenaan,

Tarikh 19.5.99 telah dilapangkan. Sila pastikan bahawa tuan mengambil langkah-langkah seterusnya tanpa surat tunjuk sebab daripada Mahkamah. Sila beritahu pihak lain yang terlibat berkenaan kelapangan tarikh tersebut di atas.

t.t.
TP
S2
14.5.99.

The DR took the action on 14 May 1999 to vacate the show cause notice and therefore there was no hearing on 19 May 1999 in open court on the show cause notice. It is clear from the file that the reply was indeed filed on 12 May 1999.

Findings Of The Court

Dissatisfied with the conduct of the DR the defendant has now appealed. The notice of appeal states that the appeal is against the decision of the DR made on 18 May 1999 to vacate the date fixed for the show cause. On this ground alone this appeal stands dismissed because there is nothing that the DR did on 18 May 1999 in respect of this file and there is no basis for the appeal. Presumably Mr. Pathmanathan for the appellant must have meant 14 May 1999 when the DR made the decision to vacate the date for the show cause.

In any case I shall consider the merits of Mr. Pathmanathan's appeal. He argued that once a notice to show cause had been issued at the court's instance it is incumbent on the defaulting party to explain or justify the delay or non-prosecution to the satisfaction of the court before taking any further step. He also argued that the said notice to show cause was a bar to the parties from taking any further steps until the cause was shown to the court's satisfaction. He pointed out that pursuant to O. 18 r. 3(4) of the Rules of the High Court 1980 (the RHC) a reply to the defence must be served by the plaintiff before the expiration of 14 days after the service of the defence. The defendant through its executive officer affirmed an affidavit stating that he had been advised by his solicitors that pursuant to O. 20 r. 1(a) of the RHC, pleadings to an action are deemed closed at the expiration of 14 days after service of the defence (see encl. 10 para 8). This is certainly not the law and I am surprised that such wrong advice has been given.

It is obvious that Mr. Pathmanathan has refused to accept what is stated in my directive in para 2 of the show cause notice dated 3 May 1999. It is plain to anyone that both parties were informed that if they wished to proceed with the suit they ought to act immediately and inform the court of their action **so that this case could be taken off the show cause list** (emphasis provided). Acting on this paragraph the PP sent in her reply, albeit many months late. But it is for the defendant to act to apply to strike out the reply as having been filed out of time subject to the defendant's realisation that the court can always at its discretion extend time.

I am unable to appreciate the conduct of the defendant. Whilst affirming an affidavit through its executive officer and pointing out that the pleadings were deemed to have been closed as at 24 November 1997 the defendant and its solicitors did nothing on their own to apply to strike out the suit. Since the defendant has cited the rules for its own purposes it is therefore relevant to point out the dismal failure on the part of the defendant to have initiated action to have terminated these proceedings based on the RHC. Order 18 r. 20(1)(a) and (b) of the RHC state that at the expiration of 14 days after service of the reply or at the expiration of 14 days after service of the defence, the pleadings in an action are deemed to be closed. Since the defence was filed on 10 November 1997 and no reply pursuant to O. 18 r. 3(4) was filed within 14 days after the service of the defence then pursuant to O. 18 r. 20(1)(b) pleadings in this case were deemed to have been closed at the expiration of 14 days after service of the defence on the defendant and on the defendant's own admission in the affidavit pleadings were deemed closed as on 24 November 1997.

Now O. 25 r. 1(1) of the RHC provides that with a view to giving directions for the further conduct of the case the plaintiff must within one month after the pleadings are deemed to be closed take out a summons for directions and which must be returnable in not less than 14 days. Obviously the plaintiff has failed to do so. But O. 25 r. 4 specifically provides that if the plaintiff fails to take out a summons for directions in accordance with the rules, the defendant may do so if it wants the matter to proceed to trial to seek an order perhaps for collateral purposes, or the defendant can apply for an order to dismiss the action.

However O. 25 r. 5 still provides that even if the defendant makes such an application to dismiss the action, the court may in the exercise of its discretion treat such an application to strike out the writ as if it were a summons for directions. Therefore the drafters of these rules in their clear wisdom have consistently and diligently maintained the court's independence to exercise its discretion. What the defendant is trying to do by this appeal is to say that once a notice to show cause is issued by the court, it has no discretion to do anything save to hear the explanation first in respect of the delay and then exercise its discretion. Such an interpretation lacks the perception that is intended in interpreting the rules relevant to striking out for want of prosecution. In fact in *Hong Kong Bank (M) Bhd v. Raja Letchumi a/p Ramarajoo & Ors* [1996] 4 CLJ 155; [1996] 2 MLJ 34 the Court of Appeal endorsed the right of the trial judge to exercise his discretion.

The defendant relied heavily on *Fitzpatrick v. Batger & Co Ltd* [1967] 2 All ER 657 where Salmon LJ said at p. 659:

> ... It is said in this case that the action ought not to be dismissed, because the defendants might have taken out a summons to dismiss for want of prosecution much earlier than they in fact did. They no doubt, however, were relying on the maxim that it is wise to let sleeping dogs lie. They had good reason to suppose that a dog which had remained unconscious for such long periods as this one, if left alone, might well die a natural death at no expense to themselves; whereas, if they were to take out a summons to dismiss the action, they would merely be waking the dog up for the purpose of killing it at great expense which they would have no chance of recovering. I am not surprised that they did not apply earlier, and I do not think that the plaintiff's advisers should be allowed to derive any advantage from that fact.

With the greatest of respect to the learned Law Lord I do not agree. To let a sleeping dog lie and thus let the case be, seems in my view to ignore the express provisions of the Rules of the High Court 1980 giving a course of action to the defendant. Ignoring the rules on the pretext of letting sleeping dogs lie, is to treat the Rules of the High Court as nothing more than mere advice or pedantic verbiage.

In fact the Federal Court in *Public Finance Bhd v. Natcom Development Sdn Bhd & Ors* [1996] 2 MLJ 657 gave a timely warning to the High Court to hearken to the spirit and intendment of O. 34 r. 8 of the RHC and only to strike out those cases falling clearly within the principle as enunciated in the said judgment.

Order 34 r. 8 reads as follows:

> 8.(1) If in any case or matter where a notice of trial is required the plaintiff does not within six weeks after the time when he first becomes entitled to give notice of trial under rule 7 of this Order or within such extended time as the court or a judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, or may apply to the court or judge to dismiss the action for want of prosecution; and on the hearing of such application, the court or a judge may order the action to be dismissed accordingly, or may make such other order, and on such terms, as to the court or judge may seem just.
>
> (2) If no notice of trial is given or if the defendant makes no application to dismiss the action under sub-rule (1), the court or judge may after giving such notice as may be necessary dismiss the cause or matter or may make such order and on such terms as to costs or otherwise as to the court or judge may seem just.

The Federal Court went on to state that O. 34 r. 8 provides an effective machinery for the disposal of cases long languishing in our courts. When properly used, it has the beneficial effect of clearing the courts of the unnecessary backlog with which they are burdened. However, when used without due care, it would perpetuate the very delay which it is intended to cure.

I grant that if the notice to show cause as issued by the court did not have the relevant para. 2 which reads as follows:

> 2. Jika tuan ingin meneruskan dengan pendakwaan kes ini, sila ambil tindakan susulan dengan serta-merta dan memberitahu Mahkamah melalui surat akan tindakan yang telah diambil agar kes ini dapat dikeluarkan daripada senarai kes tunjuk sebab.

The court will have to listen to the explanation for the delay. However, because the defendant itself failed to act, the court did not wish to consider the issue of delay and included the relevant para. 2. In the court's view, the inordinate delay was by both parties. The delay by the defendant negates the delay by the plaintiff. Clearly the cases relating to want of prosecution cannot apply to this case because of the inclusion of para. 2 in the notice to show cause set out by this court. In almost all the cases cited, the party seeking to strike

out had applied by summons to strike out. Here the court moved on its own motion. The justice of the case warrants that the court acts on its own notice which provided for the withdrawal of this case from the show cause list if either party acted on the notice.

To my mind this appeal is frivolous, vexatious and an abuse of this court's valuable time. I therefore had no hesitation in dismissing this appeal with costs without the need of having the respondent to reply.